

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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STEVEN BRAUNSTEIN,

Case No. 3:13-cv-00666-MMD-WGC

Petitioner,

ORDER

v.

GREGORY COX, et al.,

Respondents.

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner.

The petition in the instant action challenges petitioner's state conviction for sexual assault on a minor in the Eighth Judicial District Court for the State of Nevada. Petitioner previously challenged the same conviction in this Court, in a federal habeas petition filed under case number 3:11-cv-00587-LRH-WGC. The petition in case number 3:11-cv-00587-LRH-WGC, which raised the same issues asserted in the instant petition, was dismissed as procedurally barred by order filed August 22, 2011. (Dkt. no. 37 in 3:11-cv-00587-LRH-WGC.) Judgment was entered that same date. (Dkt. no. 38 in 3:11-cv-00587-LRH-WGC.) Petitioner appealed. By order filed October 3, 2012, the United States Court of Appeals for the Ninth Circuit denied petitioner's application for a certificate of appealability. (Dkt. no. 43 in 3:11-cv-00587-LRH-WGC.)

"Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A).

1 Pursuant to 28 U.S.C. § 2244(b)(1), “[a] claim presented in a second or successive  
2 habeas corpus application under section 2254 that was presented in a prior petition  
3 shall be dismissed.” In the prior habeas case in which petitioner challenged his  
4 conviction for sexual assault on a minor, this Court dismissed the petition with prejudice,  
5 as the petition was procedurally barred. (Dkt. no. 37 in 3:11-cv-00587-LRH-WGC.)  
6 Where a petition is dismissed with prejudice because of a procedural default, the  
7 dismissal constitutes a disposition on the merits and renders a subsequent petition  
8 successive for purposes of 28 U.S.C. § 2244(b). *McNabb v. Yates*, 576 F.3d 1028,  
9 1029-30 (9<sup>th</sup> Cir. 2009); *Henderson v. Lampert*, 396 F.3d 1049, 1053 (9<sup>th</sup> Cir. 2005).  
10 The prior habeas corpus petition was dismissed with prejudice as procedurally barred,  
11 and the instant habeas petition asserts the same claims as the prior petition. The instant  
12 petition is a successive petition, which requires petitioner to seek and obtain leave of  
13 the Ninth Circuit Court of Appeal to pursue. See 28 U.S.C. § 2244(b)(3) *et seq.*  
14 Petitioner has not presented this Court with proof that he has obtained leave to file a  
15 successive petition from the Ninth Circuit Court of Appeals. Therefore, the instant  
16 petition will be dismissed as successive.

17 In order to proceed with any appeal, petitioner must receive a certificate of  
18 appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9<sup>th</sup> Cir. R. 22-1; *Allen v.*  
19 *Ornoski*, 435 F.3d 946, 950-951 (9<sup>th</sup> Cir. 2006); *see also United States v. Mikels*, 236  
20 F.3d 550, 551-52 (9<sup>th</sup> Cir. 2001). District courts are required to rule on the certificate of  
21 appealability in the order disposing of a proceeding adversely to the petitioner or  
22 movant, rather than waiting for a notice of appeal and request for certificate of  
23 appealability to be filed. Rule 11(a) of the Rules Governing Section 2254 and 2255  
24 Cases. Generally, a petitioner must make “a substantial showing of the denial of a  
25 constitutional right” to warrant a certificate of appealability. 28 U.S.C. § 2253(c)(2);  
26 *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). “The petitioner must demonstrate that  
27 reasonable jurists would find the district court's assessment of the constitutional claims  
28 debatable or wrong.” *Id.* (quoting *Slack*, 529 U.S. at 484). In order to meet this threshold

1 inquiry, the petitioner has the burden of demonstrating that the issues are debatable  
2 among jurists of reason; that a court could resolve the issues differently; or that the  
3 questions are adequate to deserve encouragement to proceed further. *Id.* In this case,  
4 no reasonable jurist would find this Court's dismissal of the petition debatable or wrong.  
5 The Court therefore denies petitioner a certificate of appealability.

6 It is therefore ordered that this action is dismissed without prejudice as a  
7 successive petition.

8 It is further ordered that all pending motions in this action (including dkt. nos. 1, 4,  
9 and 8) are denied.

10 It is further ordered that petitioner is denied a certificate of appealability.

11 It is further ordered that the Clerk shall enter judgment accordingly.

12 DATED THIS 23<sup>rd</sup> day of May 2014.

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MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE